IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No. 25 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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PENTA FREIGHT PVT. LTD - Petitioner(s)
Versus
M/S. SUDEEP PHARMA LIMITED. - Respondent(s)

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Appearance :
MR SACHIN D VASAVADA for Petitioner(s) : 1,
MR SP MAJMUDAR for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 08/05/2007

ORAL JUDGMENT

Present company petition has been filed by the petitioner PENTA FREIGHT PVT. LTD under section 433 of the Companies Act, 1956 (for short “the Act”) for an appropriate order of winding up of M/s SUDEEP PHARMA LIMITED (hereinafter referred to as “the company”).

2. It is submitted in the petition that somewhere in the year 2004-05, the company had approached the petitioner for shipment of its goods/its cargo at Durban, South Africa and after mutual discussions, meetings and negotiations, the petitioner agreed to provide services/supply goods to the client of the company on its assurance that it would make the payment for the same within the agreed time and pay interest in case the payment was delayed for any reason. It is submitted that on such assurance and as per the instruction from the company from time to time, the petitioner acted accordingly and dispatched the shipment as per the shipping line suggested by the company at Durban, South Africa to the client of the company. It is submitted that the petitioner had rendered the services and had supplied the goods to the respondent company and had also issued invoices accordingly. It is submitted in the petition that the intention of the company was mala fide and not to make the payment for the service

providing them and the petitioner umpteen times requested to make the payment within reasonable time to enable the petitioner to do the needful for the company. It is further submitted that even the cheque issued to the petitioner was also got bounced which was given by the company to the petitioner for discharging its liability but at the request of the company no criminal action was taken. It is submitted that the company is indebted to the petitioner in the sum of Rs.1,13,445.50paisa along with the interest at the rate of 18% per annum on the outstanding sums. It is submitted that the company had duly acknowledged its debt, due and payable to the petitioner for the outstanding amount. It is further submitted that the petitioner served statutory notice through Registered A.D. to the company and upon waiting for the stipulated time, the petitioner has not received any reply and therefore, the present petition has been filed. It is further submitted that the company has not discharged any obligation and therefore, has neglected to pay the dues and is liable to be wound up.

3. Petition is opposed by the company and an affidavit-in-reply is filed on behalf of the company. It is submitted that the present company petition is required to be dismissed on the

ground of suppression of material fact. It is submitted that on 11-6-05, the company received a quotation from the petitioner for shipment to Durban mentioning the transit time of the consignment to be 14-18 days and the sailing to be on weekly basis. That after the confirmation from the company, the container was loaded on 17-5-05 and forwarded from ICD Dashrath to JNPT and the container was offloaded in the buffer yard. It is submitted that the company thereafter received a draft Bill of Lading for approval on 29-6-2005. It is submitted in the reply that after few days upon rigorous follow up by the company, it was found that the container had not yet sailed and the company was informed that it was a monthly sailing vessel and therefore, the container had not sailed. It is further submitted that as the consignment had not sailed, the company had to airship two consignments totalling to 3500 kg. One consignment was sent on 14-7-2005 and another on 3-8-2005 with Air Freight Cost of approximately Rs.5 lacs. However, it is submitted that the company had made various requests to the petitioner company to load the container on some other vessel, but there was no favourable respondent from the petitioner company. It is submitted that the container ultimately sailed after two months to Durban. It is submitted that after shipment of the consignment, the petitioner

company approached the respondent company for payment of freight, detention and transportation charges. However, since the company had to bear the heavy expenses sending its consignment by air, which was only due to the fault and negligence of the petitioner company, the respondent company was not liable to pay the said amount. It is submitted in the reply that the company was forced to give a security cheque of Rs.1,13,445.50paisa since without the same, the Bill of Lading was not to get released and the company had given a cheque of Rs.1,13,445.50paisa under protest. Thus, the claim of Rs.1,13,445.50paisa is disputed. Shri Majmudar, learned advocate appearing on behalf of the respondent company has submitted that in the petition, deliberately, there are no averments with regard to dispute and that the aforesaid cheque of Rs.1,13,445.50paisa was given under protest. It is also further submitted by Shri Majmudar that there is no reference to the dispute between the petitioner and the respondent and no reference to any of the correspondence which has taken place between the respondent company and the petitioner. Therefore, it is submitted that apart from the fact that debt is not admitted and there are bona fide disputes, the present petition is required to be dismissed on the ground that the petitioner has not come with clean hands and has also

not submitted with regard to the dispute between the respondent company and the petitioner. Under the circumstances, it is requested not to exercise the discretion in favour of the petitioner company when the petitioner has not come with clean hands. It is also further submitted that even, otherwise, the financial condition of the company is sound and therefore, also the company is not required to be wound up. Shri Majmudar has relied upon the following decisions in support of his submission to dismiss the present petition.

1. **Pradeshya Industrial and Investment Corporation of Utter Pradesh Vs. North India Petro Chemical Ltd. And Another reported in (1994) 3 SCC 348.**
2. **Madhusudan Gordhandas and Co. reported in (1972) 42 Comp. Cases 125**
3. **Mediqup Systems Pvt. Ltd. Vs. Proxima Medical System GMBH reported in (2005) 7 SCC 42**
4. **Tata Iron & Steel Company Ltd. V/s. Micro Forge (India) Ltd reported in 2000 (2) GLR 1599.**

4. In the case of ***Pradeshya Industrial and Investment Corporation of Uttar Pradesh [supra]***, the Supreme Court has held that, ***"A debt for the purpose of Section 433(e)***

of the Companies Act must be a determined or a definite sum of money payable immediately or at a future date." In the said Judgment,the Hon'ble Supreme Court considered the following observations of the Hon'ble Supreme Court made in ***Madhusudan Gordhandas and Co. [supra] ;***

> ***"Two rules are well settled. First, if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The court has dismissed a petition for winding up where the creditor claimed a sum for goods sold to the company and the company contended that no price had been agreed upon and the sum demanded by the creditor was unreasonable. (See London and Paris Banking Corporation, In re [1875] LR 19 Eq.444). Again, a petition for winding up by a creditor who claimed payment of an agreed sum for work done for the company when the company contended that the work had not been done properly was not allowed. (See Brighton Club and Norfolk Hotel Co.Ltd., In re [1865] 35 Beav. 204).***
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> ***Where the debt is undisputed the***

court will not act upon a defence that the company has the ability to pay the debt but the company choses not to pay that particular debt. (See A Company, In re [1894] 94 SJ 369; [1894] 2 Ch 349 (Ch D)). Where, however, there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantify the debt precisely. (See Tweeds Garages Ltd., In re [1962] Ch 406; [1962] 32 Comp Gas 795 (Ch D)). The principles on which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law, and, thirdly, the company adduces prima facie proof of the facts on which the defence depends.

Another rule which the court follows is that if there is opposition to the making of the winding-up order by the creditors the court will consider their wishes and may decline to make the winding-up order. Under section

557 of the Companies Act, 1956, in all matters relating to the winding-up of the company the court may ascertain the wishes of the creditors. The wishes of the shareholders are also considered, though, perhaps, the court may attach greater weight to the views of the creditors. The law on this point is stated in Palmer's Company Law, 21st edition, page 742, as follows :

"This right to a winding-up order is, however, qualified by another rule, viz., that the court will regard the wishes of the majority in value of the creditors, and if, for some goods reason, they object to a winding-up order, the court in its discretion may refuse the order.'

The wishes of the creditors will, however, be tested by the court on the grounds as to whether the case of the persons opposing the winding-up is reasonable; secondly, whether there are matters which should be inquired into and investigated if a winding -up order is made. It is also well-settled that a winding-up order

will not be made on a creditor's petition if it would not benefit him or the company's creditors generally. The grounds furnished by the creditors opposing the winding up will have an important bearing on the reasonableness of the case. (See P & J. Macrae Ltd. In re [1961] 1 All ER 302; [1961] 31 Comp Cas 424 (CA).”

It is beyond dispute that the machinery for winding up will not be allowed to be utilized merely as a means for realising its debts due from a company. In Amalgamated Commercial Traders (P.) Ltd. vs. Krishnaswami (A.C.K.)[1965] 35 Comp Cas 456, 463 (SC) this court quoted with approval the following passage from Buckley on the Companies Acts, 13th edition, page 451 :

“It is well-settled that a winding-up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the company. A petition presented ostensibly for a winding-up order but really to exercise pressure will be dismissed, and under circumstances

may be stigmated as a scandalous abuse of the process of the court."

4. Similar view has been expressed by the Hon'ble Supreme Court in the case of **Mediqup Systems Pvt.Ltd. [supra],** and the Hon'ble Supreme Court has observed that, An order under section 433(e) of the Companies Act, 1956 is discretionary. There must be a debt due and the company must be unable to pay it. It is further observed that, A debt under this section must be a determined or definite sum of money payable immediately. It is also held that if the debt is bona fide disputed and the defence is a substantial one, the court will not pass an order of winding up the company. The Division Bench of this Court also in the case of **Tata Iron & Steel Company Ltd. [supra]** has laid down certain general principles in a case of winding-up proceedings and after considering various decisions of the Hon'ble Supreme Court, more particularly in the case of **Madhusudan Gordhandas & Co. vs. Madhu Woollen Industries Pvt.Ltd. [supra]; Harinagar Sugar Mills v. Court Receiver, H.C. Bombay, AIR 1966 SC 1707; Pradeshiya Industrial & Investment Corporation of U.P. vs. North India Petrochemicals Ltd. 1994 (3) SCC 348,** the judgment of the learned Single Judge of this Court in the

case of **American Express Bank Ltd. v. Core Health Care Ltd. 1999 (96) Comp.Cases 841;** and another decision of this Court in the case of **Ashok Fashions vs. Magdoot Acid & Chemicals (Guj.), 1998 (91) Comp.Cases 655,** the order passed by the learned Single Judge admitting the winding up petition came to be set aside by holding that when there exists bona fide disputes and the dues are not admitted the winding-up petition is required to be dismissed.

Heard the learned advocates appearing on behalf of the parties.

5. That the present petition has been filed under section 433 of the Act for an appropriate order of winding up of the respondent company. An order under section 433 (e) of the Act is discretionary and equitable. When, it is found that the petitioner has not come with clean hands and has suppressed the material facts with regard to the dispute, in an appropriate case, the Court may refuse to exercise the discretion in favour of the petitioner. In the present case, it appears to the Court on considering the affidavit-in-reply and the other documents and the correspondence that right from the very beginning there is a dispute and that even the cheque of Rs.1,13,445.50paisa paid by communication dated 20th September 2005 was specifically under protest. There is no reference in the petition

that the aforesaid cheque was paid under protest and that there was a dispute. Not a single correspondence is produced on record along with the petition. As such there are no averments with regard to any dispute and the correspondence between the company and the petitioner. Thus, it appears to the Court that the petitioner has not come with clean hands and has suppressed the material fact with regard to the dispute which was right from the very beginning i.e. from 20-9-2005 and has withheld the vital documents such as correspondence between the parties. Under the circumstances and considering the above, this Court declines to exercise the discretionary powers in favour of the petitioner and the present petition is required to be dismissed on this ground alone.

6. Even, otherwise, there are bona fide disputes raised on behalf of the respondent company right from the very beginning, more particularly, September 2005 and the debt is not admitted. There must be a debt due and the company must be unable to pay it. A debt under section 433 must be a determine or a definite sum of money payable immediately. If the debt is bonafidely disputed and the defence is a substantial one, the Court will not pass an order of winding up the company.

7. For the reasons stated above and the fact that the petitioner has not come with clean hands and has not stated the correct facts before this Court and has suppressed the material facts and withheld the vital documents, such as correspondence between the parties with regard to the dispute, the present petition is required to be dismissed and is accordingly dismissed. In the facts and circumstances of the case and the conduct of the petitioner, the same is dismissed with exemplary costs, which is quantified at Rs.5000/-, which the petitioner is directed to deposit with the Registry of this Court within a period of six weeks from today and on such deposit, Office is directed to transmit the same to the Gujarat High Court Legal Aid Committee. Office is also directed to report this Court whether the amount of costs has been deposited by the petitioner within stipulated time or not.

(M.R. Shah, J.)

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